UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BUD'S WOODFIRE OVEN LLC D/B/A AVA'S PIZZERIA	*	
	*	
Respondent		
and	*	**Case 5-CA-194577**
RALPH D. GROVES, AN INDIVIDUAL		
	*	
Charging Party		
	*	

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RESPONDENT'S OPPOSITION TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

NOW COMES Respondent, Bud's Woodfire Oven, LLC d/b/a Ava's Pizzeria (the "Respondent" or "Ava's Pizzeria") by, Adam E. Konstas, Leslie R. Stellman, and the law firm PESSIN KATZ LAW, P.A., its undersigned counsel, and respectfully submits this Opposition to the General Counsel's Exceptions to the Decision of the Administrative Law Judge (the "ALJ") in the above-captioned action pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (the "Board").

I. OVERVIEW.

This case involves a back-of-house kitchen worker at Respondent's restaurant, the Charging Party, Ralph D. Groves (the "Charging Party" or "Groves"), who felt that Brian Ball ("Ball"), the corporate general manager of the restaurant, did not do enough to help out the kitchen staff with their duties.[1] *See* ALJD, at 4:2-5.[2] To express his frustration, Groves spoke out during

[1] Although Respondent's workforce is not unionized and there is no collective bargaining agreement in place, Mr. Groves' complaint is essentially that a supervisor was not performing enough bargaining unit work.
[2] References to the Administrative Law Judge's Decision appear as "ALJD" [page number]:[line number].

a staff meeting on October 15, 2016 and said that Ball did not do "shit" around the restaurant. *Id.*, at 2:38-4:5. Groves was terminated by Ball later that day. *See id.* at 5:14.

Groves filed a Complaint against Respondent in which he alleged that the Respondent discharged him in violation of Section 8(a)(1) of the National Labor Relations Act (the "Act") "because he complained during an employee group meeting about [Ball's] failure to assist kitchen employees." *Id.* at 1:5-6. Groves also alleged that the Respondent "compels employees to sign a mandatory arbitration agreement which waives their rights to receive any relief form the National Labor Relations Board's (the Board) processes in violation of Section 8(a)(1) and 8(a)(4)." *Id.* at 1:7-9. The Respondent denied the allegations. *See id.* at 1:9-12.

On April 3, 2018, the parties participated in a hearing before Administrative Law Judge Michael A. Rosas. *See id.* On May 18, 2018, the ALJ issued his decision, which included his findings of fact and conclusions of law based on the record and his observation of the testimony and demeanor of the witnesses and the consideration of post-hearing briefs filed by the parties (the "ALJ Decision"). *See id.* Ultimately, the ALJ dismissed the allegations that the Respondent discharged Groves in violation of Section 8(a)(1) of the Act, dismissed the allegation that the arbitration agreement violated Section 8(a)(4) of the Act, and found that the arbitration agreement violated Section 8(a)(1) of the Act. *See id.* at 9:10-11; 11:17-18

With regard to Groves' termination, the ALJ concluded that the "credible evidence established overwhelmingly that Groves was discharged because he criticized Ball during the earlier staff meeting for not doing anything to help out the kitchen staff." *Id.* at 7:25-26. Critically, however, the ALJ found that Groves' outburst during the staff meeting *did not* constitute protected concerted activity within the meaning of Section 7 of the Act. *See id.* at 8-9. Having heard from Groves as well as two co-worker witnesses, the ALJ found that "there was no corroboration for

Groves' hearsay testimony that any of his coworkers complained about or otherwise shared *his* concerns about Ball's involvement in kitchen operations." *Id.* at 8:26-28 (emphasis in original).

Additionally, the ALJ concluded that "[i]t is also difficult to imagine how lashing out at a manager who asks employees for feedback by asking, 'how do you know you don't do shit around here,' even begins to lay the foundation for meaningful dialogue about employees' terms and conditions of employment." *Id.* at 8:39-41. Whereas protected activity typically "include[s] terms and conditions of employment such as wages, benefits, working hours, the physical environment, dress codes, assignments, responsibilities, and the like," the ALJ found that Groves' outburst fell into the category of "personal gripes directed at supervisors and managers unrelated to their terms and conditions of employment." *Id* at 8:42-46 (citing *New River Industries, Inc. v. N.L.R.B.*, 945 F.2d 1290, 1294 (4th Cir. 1991)). The ALJ viewed Groves' insult of Ball as having nothing to do with Groves' work conditions but rather as "calculated to undermine Ball's managerial authority. *Id.* at 9:1-4.

The ALJ also found that the arbitration agreement violated Section 8(a)(1) of the Act because it unlawfully restrains employees' Section 7 rights, but that it *did not* violate Section 8(a)(4) of the Act because the Respondent took no further steps to enforce the Arbitration Agreement upon Groves' filing of his charge in this case. *See id.* at 11:13-15. Absent such proof, the ALJ could find no violation of Section 8(a)(4) since Section 8(a)(4) requires discharge or discrimination against the employee "because he has filed charges or given testimony under this Act." *Id.* at 11:4-5.

On June 29, 2018, Respondent filed Limited Exceptions to the portion of the ALJ's decision dealing with the lawfulness of the arbitration agreement under Section 8(a)(1) of the Act. The General Counsel filed eleven (11) exceptions to the ALJ's Decision along with a brief in

support thereof. *See* General Counsel's Exceptions ("GC's Exceptions" and "GC's Brief"). Exceptions 1-8 concerned the ALJ's conclusion that Groves' outburst during the October 15, 2016 meeting did not constitute protected concerted activity under the Act. *See* GC's Exceptions, at 1-3. Exceptions 9-10 concerned the ALJ's conclusion that the arbitration agreement did not violate Section 8(a)(4) of the Act and the ALJ's analysis of the arbitration agreement under recent Board precedent and conclusion that it violated Section 8(a)(1) of the Act. *See id.* at 3. Exception 11 concerned "[t]he ALJ's failure to rule on the General Counsel's request for a notice mailing." *Id.*

For the reasons discussed herein, and as demonstrated by the record developed before the ALJ in this case, the ALJ's Decision is supported by substantial evidence and is grounded in well-settled Board precedent. Accordingly, the Board should adopt the ALJ's findings of fact and conclusions of law and dismiss the allegations in the Complaint that Respondent violated Section 8(a)(1) of the Act by discharging Groves and that it violated Section 8(a)(4) of the Act by maintaining an Arbitration Agreement.

II. ARGUMENT

a. THE ALJ'S DECISION IS ENTITLED TO DEFERENCE

The ALJ's findings are given great weight in cases such as this where the ALJ had the first-hand opportunity to observe witness demeanor, make credibility determinations, and resolve conflicting testimony. *See Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496–97, 71 S. Ct. 456, 468–69, 95 L. Ed. 456 (1951) ("The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case."); *see also Inova Health Sys. v. N.L.R.B.*, 795 F.3d 68, 74 (D.C. Cir. 2015) (recognizing that it is "the Board's longstanding policy is not to overrule an ALJ's credibility judgments unless 'the clear preponderance of all the relevant evidence convinces' the panel that the determination is incorrect." (citing *E.N. Bisso &*

Son, Inc. v. NLRB, 84 F.3d 1443, 1444 (D.C.Cir.1996)). As the Supreme Court recognized in *Universal Camera*: "Nothing in the statutes suggests that the Labor Board should not be influenced by the examiner's opportunity to observe the witnesses he hears and sees and the Board does not. Nothing suggests that reviewing courts should not give to the examiner's report such probative force as it intrinsically commands." *Universal Camera*, 340 U.S. at 495. The Supreme Court further noted that legislative history of the Administrative Procedure Act and the Taft-Hartley Act "gave significance to the findings of examiners" and due "regard for the responsibility devolving on the examiner." *Id.* at 496. Accordingly, the "Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *St. Bernard Hosp. & Health Care Ctr. & Earl Liggins*, 360 NLRB 53, 63 (2013) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). The Respondent submits that such deference to the findings of the ALJ should be given in this case.

b. THE ALJ CORRECTLY FOUND THAT GROVES DID NOT ENGAGE IN CONCERTED ACTIVITY (GC'S EXCEPTIONS 1-5).

The General Counsel's Exceptions 1-5 concern the issue of whether Groves engaged in "concerted" activity within the meaning of Section 7 of the Act. The General Counsel contends that the ALJ erred because he relied on distinguishable authority and because he adopted an improperly "narrow view of protected concerted activity[,]" GC's Brief, at 10. Contrary to the General Counsel's assertion, the ALJ applied the correct legal standards for determining whether an individual employee engaged in concerted activity within the meaning of the Act and his finding that Groves did not engage in concerted activity is amply supported by evidence in this case.

In resolving "whether Groves acted on his own behalf or engaged in protected concerted conduct during the October 15 staff meeting[,]" the ALJ properly applied the Board's *Meyers*

Industries line of cases, which involve "instances in which an individual employee brings group complaints to the attention of management." ALJD, at 7:39-45 (relying on *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984) and *Meyer Industries (Meyers II)*, 281 NLRB 882, 887 (1986)). In *Meyers I*, the Board stated that "to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, 268 NLRB at 497. Furthermore, the Board stated that it is insufficient for the "General Counsel to set out the subject matter that is of alleged concern to a theoretical group and expect to establish concert of action thereby." *Id.* In *Meyers II*, the Board, having considered the effect of the Supreme Court's decision in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984) on the concerted activity standard, reiterated that its "definition of concerted activity in *Meyers I* encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II*, 281 NLRB at 887.

Contrary to the ALJ's findings, the General Counsel would have the Board infer a finding concerted activity simply because "Ball's lack of help was a subject of multiple conversations between kitchen employees and this lack of assistance affected their work." GC's Brief, at 12. To this end, the General Counsel dismissed as semantics the ALJ's finding that Ball's failure to pitch in with back-of-the-house work was not a "concern" of other employees even it if came up in discussion. *Id.* Additionally, the General Counsel argues that "the judge seemingly disregarded without explanation Butler's testimony: 'When I first started there, that's all I seen, where Brian [Ball] usually stands at . . . [instead of] moving around like *everyone else wanted him to.*'" GC's

Brief, at 12 (citing Tr. 68:4-11) (emphasis in GC's Brief).[3] Furthermore, under the General Counsel's reasoning, Groves' outburst is *per se* concerted activity simply by virtue of having raised a topic of discussion amongst other employees in a group meeting setting. The General Counsel's arguments are inconsistent with Board precedent and lack factual support in the record.

First, there is simply no evidence in the record developed before the ALJ that Ball's management style was truly a group complaint of the kitchen employees. To be sure, the ALJ had the opportunity to hear testimony from Jerome Butler, a current employee of respondent, and Lynell Harris, a former employee, and make credibility determinations based on their testimony and demeanor. *See* ALJD, at 3:20-24. In light of the concerted activity standard adopted by the Board in the *Meyers Industries* line of cases, the ALJ found that "there was no corroboration for Groves' hearsay testimony that any of his coworkers complained about or otherwise shared *his* concerns about Ball's involvement in kitchen operations." ALJD, at 8:26-28. Additionally, simply because other employees joked about Ball and actually asked him to help out on occasion did not transform Groves' individual outburst into concerted activity for the ALJ. *See id.* at 8:29-30. What the General Counsel labels as "semantics" – i.e., whether Ball was truly a group complaint or just a topic of discussion, was instead a critical distinction made by the ALJ in finding no concerted activity in this case under settled Board precedent.

Contrary to the General Counsel's assertion, the ALJ expressly considered Butler's testimony and found that "Butler agreed with Groves' comments that Ball did not help out like other managers" and "'stands [by] the wall all of the time,' instead of 'moving around like everyone else wanted him to.'" ALJD, at 3:21 n.6 (citing Tr. 65-71). However, the ALJ noted that Butler "did not characterize Ball's management style as a 'concern' or complaint, explaining that

[3] References to the transcript of testimony given at the hearing hereinafter will be referenced as "Tr. ___:___."

'[t]here's no issue with me' and that other employees actually 'joked' about the fact that Ball stood by the wall." *Id.* During his testimony, Mr. Butler explained – "when I first started there, that's all I seen, where Brian usually stands at. *He has a full view of the restaurant.*" *Id.* at 68:4-6 (emphasis added). Thus, Ball's standing on the wall was not a concern or a complaint for Butler, as he evidently understood that Ball, as a manager, stood by the wall in order to have a full view of the restaurant to fulfill his managerial duties. The ALJ found that "Harris also failed to corroborate Groves' testimony that employees complained or were concerned about Ball's management role" because "when asked whether she agreed with Groves' comments, Harris said, 'I don't know if I did or I didn't.'" *Id.* at 3:24 n. 7 (citing Tr. 73-78). The General Counsel called no other witnesses to support the position that Mr. Groves' comments were delivered for the purpose of inducing further group action or that Groves' complaints were truly group complaints. The evidence adduced at the hearing demonstrated that they were not.

Groves testified that he was the only employee who spoke up during the meeting, he did not say anything about wages, benefits, leave, breaks, or schedules, and that he spoke out because, in his words: "I felt like [Ball] needed to help out more." Tr. at 28:6-8; 115:6-7; 115:8-11; 115:12-23; 116:1. Thus, the ALJ correctly determined that Groves' outburst centered on "*his* concerns about Ball's involvement in the kitchen operations" rather than widely held concerns amongst the workforce. ALJD, at 8:28. Contrary to the General Counsels argument, the ALJ adequately accounted for all of the evidence set forth during the hearing in reaching his decision that Groves did not engage in concerted activity.

The ALJ's findings in this regard are consistent with Board and Appellate Court precedent which rejects the notion of implied or constructive concerted activity. In *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014), which the ALJ relied upon in his ruling, the

Board held that a worker's "conduct in approaching her coworkers to seek their support of her efforts regarding [a sexual harassment complaint to management] would constitute concerted activity" under the *Meyers Industries* concerted activity standard. In reaching its decision, the NLRB clarified that the "protected" and "concerted" elements are "analytically distinct" and that "whether an employee's activity is 'concerted' depends on the manner in which the employee's actions may be linked to those of his coworkers." *Id.* Whereas in *Fresh & Easy*, the NLRB found concrete concerted action where multiple employees explicitly and materially offered their support for another regarding a common concern, Groves spoke up without the support of any of his co-workers on a topic which was evidently not a concern for other kitchen workers.

In *Manimark*, which the ALJ also cited in his ruling, the Sixth Circuit relied upon the Board's rulings in *Meyers I* and *Meyers II* in rejecting the concept of "constructive concerted activity." *Manimark Corp. v. N.L.R.B.*, 7 F.3d 547, 551 (6th Cir. 1993) ("This court has never held that an employee's action in merely repeating the jointly held concerns of other employees, standing alone, suffices for a finding of concerted action. Indeed, the Board itself in the *Meyers* cases rejected the similar notion that a single employee's safety complaint was per se concerted because it was of common concern to the group."); *see also Jim Causley Pontiac, Div. of Jim Causley, Inc. v. N.L.R.B.*, 620 F.2d 122, 126 (6th Cir. 1980) (acknowledging the Sixth Circuit's earlier decision in *ARO, Inc. v. N.L.R.B.*, 596 F.2d 713 (6th Cir. 1979), "which rejected the theory of implied concert of action and held that an employee must be actually, rather than impliedly, representing the views of other employees in order to be engaging in protected concerted activity"). The General Counsel cannot point to any evidence in the record to show that other employees shared Groves' concerns and that Groves actually represented others when he spoke up at the October 15, 2016 meeting. The General Counsel's attempt to apply an implied or

constructive concerted activity standard in this case when the evidence developed at the hearing clearly demonstrates otherwise should be rejected.[4]

The General Counsel's attempt to distinguish the cases relied upon by the ALJ in this case is unavailing. First, the General Counsel argues that *Manimark* is inapplicable in the context of a group meeting. The General Counsel relies on *N.L.R.B. v. Talsol Corp.*, 155 F.3d 785, 797 (6th Cir. 1998), *Cks Tool & Eng'g, Inc. of Bad Axe*, 332 NLRB 1578, 1578 n.1 (2000), and *Cibao Meat Products*, 338 NLRB 934 (2003) for this point. However, an essential predicate for finding concerted activity in each of those cases was that the employee at issue raised truly "group concerns" at a "group meeting" which was called specifically to discuss those shared concerns which plainly affected all employees' working conditions and job duties. *See Talsol*, 155 F.3d at 797 (noting that "[employee's] challenges to the safety measures occurred after he questioned various employees concerning safety at the plan and during a group meeting with other employees and management . . . conducted specifically to address safety issues at the plant"); *Cks Tool & Eng'g, Inc. of Bad Axe*, 332 NLRB 1578, 1578 (2000) (concerted activity found in employee's "raising of group concerns about productivity in a group meeting called by the Respondent to discuss productivity and efficiency"); *Cibao*, 338 NLRB No. at 934 (finding that employee engaged in protected concerted activity when he criticized the employer's policy during a meeting called by management to inform plant employees that they were required to help open the plant gate in the morning when he stated that it was not the employees' job to open the gate and that

[4] The General Counsel's argument goes against the weight of precedent, as several Federal Appellate Courts have rejected the theory of implied or constructive concerted activity, and instead require that the Board "prove that the employee in question was 'acting on behalf of, or as a representative of, other employees rather than acting for the benefit of other employees only in a theoretical sense.'" *Manimark Corp.*, 7 F.3d at 550 (citing *ARO, supra*); *see also Krispy Kreme Doughnut Corp. v. N.L.R.B.*, 635 F.2d 304, 310 (4th Cir. 1980) (reasoning that since "'[c]oncerted activity' is an essential predicate, in effect a jurisdictional requirement, for Board action under the Act" and "[t]he burden of establishing by proof such essential predicate to quasi-jurisdiction rests on the Board," then "[i]t would be odd, indeed, if this essential quasi-jurisdiction predicate might be supplied by a presumption admittedly resting on no factual base but predicated on a purely theoretical assumption.").

"we are the workers, the employees, after you open the factory"). The circumstances relied upon by the Board in those cases to find concerted activity are noticeably absent in this case.

Here, while other employees might have acknowledged and even joked about Ball's lack of involvement in the kitchen, the ALJ found ample evidence that it was *not* a "concern" of other employees. Rather, the ALJ properly found that Groves' outburst amounted to "mere 'griping'" about a purely personal concern which does not constitute "concerted" activity under the Act. *Mushroom Transp. Co. v. N.L.R.B.,* 330 F.2d 683, 685 (3d Cir. 1964)) ("Activity which consists of mere talk must, in order to be protected, be talk looking toward group action . . . if it looks forward to no action at all, it is more than likely to be mere 'griping.'"); *see also Pelton Casteel, Inc. v. N.L.R.B.*, 627 F.2d 23, 28 (7th Cir. 1980) (stating that "public venting of a personal grievance, even a grievance shared by others, is not a concerted activity") (referencing *Indiana Gear Works v. N.L.R.B.*, 371 F.2d 273, 276 (7th Cir. 1967)); *N.L.R.B. v. Deauville Hotel*, 751 F.2d 1562, 1571 (11th Cir. 1985) (stating that unless "[griping and complaining] was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interests of the employees . . . a complaining and disgruntled employee may be fired for his conduct"). Not one witness supported Groves' cause, and the ALJ properly rejected Groves' testimony that coworkers expressed concerns to him about Ball's failure to pitch in as "uncorroborated hearsay." ALJD, at 3:20 n.5 In light of the evidence developed at the hearing in this case, the group setting in which Groves made his comment is of no moment and does not turn what is clearly an individual employee outburst over an individual concern not shared by other employees into concerted activity otherwise protected by the Act.

Second, the General Counsel argues that even under *Manimark*, Groves was actually, rather than "theoretically" acting on behalf of other employees. The General Counsel pointed out that

since Groves "raised an incident that did not directly affect him, but rather impacted only other employees in the kitchen, [that] directly contradicts the ALJ's findings that Groves was speaking solely on his own behalf during the meeting." GC's Brief, at 16. The General Counsel cites no evidence to support that claim, and indeed, such evidence is absent from the record. To be sure, there is no evidence that Groves' outburst was engaged in with or on the authority of other employees, that Groves sought to initiate, induce, or prepare for group action, or even that Groves brought "truly group complaints" to the attention of management. *Meyers II*, 281 NLRB at 887. Quite the opposite, the ALJ found that other employees were either not concerned with Ball's management or were ambivalent at best on the issue. *See* ALJD, at 3 fn. 5-7 (citing Tr. 65-71, 73-78). Groves' complaint was not truly a group complaint.

Quite simply, Groves did not act in concert with any of his fellow kitchen workers when he delivered his insult of Ball at the October 15, 2016 meeting. For all of these reasons, General Counsel's Exceptions 1-5 must be rejected.

c. THE ALJ CORRECTLY FOUND THAT GROVES DID NOT ENGAGE IN PROTECTED ACTIVITY (GC'S EXCEPTIONS 6-8).

The General Counsel's Exceptions 6-8 concern whether Groves engaged in "protected" activity within the meaning of Section 7 of the Act. In characterizing Groves' outburst as a "personal gripe[]" directed at Ball "unrelated to the[] terms and conditions of employment[,]" the ALJ applied settled law to the facts established at the hearing. ALJD, at 8:45-46. However, the General Counsel seeks to expose an apparent contradiction in the ALJ's Decision to support the argument that Groves' comments related to working conditions affecting all employees. *See* GC's Brief, at 16. The General Counsel then argues that that the ALJ applied the incorrect legal standard, and improperly sought to "divin[e] the intent of Grove's statements, rather than analyzing their objective content, and the obvious link between previous employee discussions about Ball,

Groves' statements during the meeting, and the manner in which it touched upon the 'employees' interests as employees."" *Id.* at 17-18. Contrary to the General Counsel's argument, the ALJ objectively analyzed Groves' comments to determine whether they related to the terms and conditions of employment and found, under the circumstances of this case, no such "obvious links" as the General Counsel suggests. Accordingly, Groves' comments are not "protected" under the Act.

First, the General Counsel's attempt to turn the ALJ's reasoning in support of his conclusion that Groves did not engage in concerted activity into a finding that Groves engaged in protected activity must be rejected. The General Counsel argues that "[b]y acknowledging that the statement was made during a group meeting, and was directed at kitchen-wide working conditions, the ALJ established that Groves' statements were protected, despite concluding otherwise." GC's Brief, at 17. The General Counsel's reading of the ALJ's Decision is flawed. To be sure, the ALJ analyzed the "concerted" and "protected" elements separately and in reaching the conclusion that Groves did not engage in concerted activities, the ALJ reasoned that Groves must "be actually, rather than impliedly, representing the views of other employees" in rejecting the notion that even if Groves' comment touched on kitchen-wide concerns, that alone does not constitute Section 7 activity. *Jim Causley Pontiac,* 620 F.2d at 126 n. 7. The ALJ also found that Groves did not engage in protected activities because his statements "encroached on a management prerogative which had nothing to do with his individual terms and conditions of employment." ALJD, at 9:3-4. The ALJ conducted these analyses separately and his reasoning in support of his finding that Groves did not engage in concerted activities cannot be used to defeat his separate finding that Groves did not engage in protected activities.

Second, the ALJ applied the proper legal standard for determining whether conduct is "protected" under the Act and analyzed Groves' conduct under an objective standard. The General Counsel asks this Board to take great leaps to fill voids in the record with their version of the facts, to find "links" between Groves' comment and the non-existent concerns of other kitchen workers and thus find that Groves' insult of Ball was somehow protected under the Act. The ALJ recognized that "[p]rotected activities have been found to include terms and conditions of employment such as wages, benefits, working hours, the physical environment, dress codes, assignments, responsibilities, and the like." ALJD, at 8:42-44 (citing *New River Industries*, 945 F.2d at 1294). Here, the ALJ found that Groves' insult of Ball was unrelated to the terms and conditions of employment, and indeed, Groves confirmed during his testimony that his outburst did not concern wages, benefits, leave, breaks, schedules, or any other specific working conditions of the kitchen staff affected by Ball's management of the restaurant. *See* Tr. at 115:12-23. The General Counsel points to no evidence to support such an "obvious link" suggested in its brief, and indeed, to infer such links in the absence of any supporting evidence would contradict the findings of the ALJ. Since the ALJ clearly found that Groves' speech was unrelated to working conditions, it is not protected under the Act.

In a further attempt to fit Groves' actions under the umbrella of Section 7, the General Counsel argues that "'derogatory comments' about a supervisor and his management style" are "protected when uttered in context of speech directly related to employee working conditions." GC's Brief, at 17. The General Counsel points to *Gross Electric, Inc.*, 366 NLRB No. 81 (May 9, 2018), where the Board found that an employee's "statements expressing concerns about a supervisor's unfair treatment and selection of workers at a job site were directly related to union members' employment concerns and, thus, directly related to his role as union president."

However, in that case, the comments were made by the union president who was serving on labor-management committee during grievance hearing to resolve a dispute regarding the employer's failure to hire another employee at a job site. *See id.* While the General Counsel makes much of the employee's statements in that case expressing concern over a supervisor, that fact was not determinative for the Board to find protected union activity given the unique context of the grievance proceeding and the identity of the speaker as union president in the *Gross Electric* case. Furthermore, the supervisor in that case selected workers for the job sites and the grievant at issue was not selected by that supervisor, which led to the grievance hearing. *See id.* Thus, the supervisor's conduct in that case had a tangible effect on the terms and conditions of the grievant's employment. Similar circumstances connecting Groves' comment to union activity, as in *Gross Electric*, much less protected activity under Section 7, is lacking in this case.

The General Counsel also relies on *In Re Astro Tool & Die Corp.*, 320 NLRB 1157, 1161–62 (1996) for the proposition that "complaints about the quality of supervision are directly related to working conditions, and therefore constitute protected concerted activity." GC's Brief, at 18. However, in *Astro Tool,* the employee's complaints about the "quality and methods of supervision" pertained directly to the supervisor's practices in the areas of "his refusal to communicate, to permit employees to propose alternative methods to perform certain tasks and to rotate from one job to another during the day, as they had under other supervisors." *In Re Astro Tool & Die Corp.*, 320 NLRB 1157, 1161 (1996). The employee at issue in *Astro Tool* also complained about management's "failure to employ her father, or [the supervisor's] lack of concern about her wrist pain" which the Board "viewed as complaints about Respondent's managerial policies." *Id.* at 1161-62.

Similarly, in *Avalon*, also relied upon by the General Counsel, the employees at a learning center criticized the performance and attitude of a supervisor who was charged with resolving employee complaints, transferring and assigning employees, and evaluating performance. *See Avalon-Carver Cmty. Ctr.*, 255 NLRB 1064, 1066 (1981). The particular employee who spearheaded a grievance against the supervisor was transferred multiple times by the supervisor in attempt to resolve complaints by co-workers regarding that employee's poor performance and the supervisor was heavily involved in that employee's discipline. *See id.* at 1067-68. There, the Board found that "the identity, capabilities, and quality of supervision, at least where, as here, *the quality of that supervision has an impact upon the employees' job interest and their ability to perform the task for which they were hired*, are the legitimate concern of employees." *Id.* at 1070 (emphasis added).

The General Counsel's argument is unavailing in this case, and *Astro Tool* and *Avalon* are of no moment, where the ALJ found that Groves' comments were clearly *unrelated* to employees' terms and conditions of employment. Viewing Groves' expression under an objective standard, the ALJ concluded:

> Groves insulted Ball by accusing him of doing nothing at the restaurant, an expression that can be reasonably interpreted as questioning the scope of his managerial responsibilities. It did not entail the very nature of Groves' work conditions, but rather was calculated to undermine Ball's managerial authority. Groves' comments thus encroached on a management prerogative which had nothing to do with his individual terms and conditions of employment.

ALJD, at 8:46 – 9:4. Groves' statement to Ball "How do you know you don't do shit around here" greatly differs from the employee complaints regarding the management decisions in *Astro Tool* and *Avalon* where the conduct of the supervisors was directly connected to the terms and

conditions of the employees' work, such as the methods of the employees' work, job assignments, performance evaluations, and transfers. Unlike *Astro Tool* and *Avalon*, Groves' statement simply expressed his displeasure with Ball's lack of hands-on involvement in the kitchen without any clear connection to terms and conditions of employment of the kitchen employees. Specifically, beyond his comment that Ball didn't "do shit," Groves cited "an example from the night before when Ball knocked over a rack of clean silverware during a busy time and merely watched as a hostess picked it up." ALJD, at 4:3-4. However, with regards to that incident, Ball recalled "it being a tight space and the guy picked up the silver – just grabbed the silverware before I even got down to it. So I didn't quite understand what that was about[.]" Tr. at 24:17-20. Groves also recalled that in response to his comment, Ball responded that "we will discuss his job duties later, and he also mentioned something about he did payroll." Tr. 104:24. Groves testified that he was "not sure what that was for." *Id.* at 104:24-25. Thus, as the ALJ recognized, Groves' complaint is more accurately characterized as questioning the scope of Ball's duties as a Corporate General Manager, which Groves evidently failed to grasp, rather than a complaint about the terms and conditions of employment for the back-of-the-house staff.

Under the circumstances of this case, the ALJ properly relied on cases more analogous to the instant case where the "employees' personal gripes directed at supervisors and managers" were "unrelated to their terms and conditions of employment." ALJD, at 8:45-46; *see New River Industries*, 945 F.2d at 1294–95 (whereas"[t]he conditions of employment which employees may seek to improve are sufficiently well identified to include wages, benefits, working hours, the physical environment, dress codes, assignments, responsibilities, and the like . . . [t]he expression of criticism about management . . . is not a condition of employment that employees have a protected right to seek to improve"); *see also Joanna Cotton Mills Co. v. NLRB,* 176 F.2d 749,

751–53 (4th Cir. 1949) (holding that activity was unprotected where the "purpose had no relation to collective bargaining, hours or conditions of work or any sort of mutual aid or protection of employees, but was simply and solely an effort on the part of [employee] to get rid of or humiliate the supervisory employee with whom he was angry").

At bottom, the General Counsel fails to acknowledge the key distinction in the ALJ's Decision which sets this case apart from those cited in the General Counsel's brief –Groves' complaint about Ball was unconnected to any terms and conditions of employment of kitchen staff, but rather encroached on a management prerogative regarding the duties and responsibilities of Ball as the Corporate General Manager. *See Trompler, Inc. v. N.L.R.B.*, 338 F.3d 747, 749 (7th Cir. 2003) (while "[t]he choice of supervisors is a management prerogative . . . [a] complaint that a supervisor's conduct is impairing the terms or conditions of the employment of the workers whom he supervises is, however, a legitimate subject for concerted activity[.]"); *see also Smithfield Packing Co. v. N.L.R.B.*, 510 F.3d 507, 518–19 (4th Cir. 2007) ("[W]e choose to follow the approach of our sister circuits, that employee protest in response to personnel decisions regarding management is protected under § 7 only where such protest is "in fact ... a protest over the actual conditions of their employment" and the "means of the protest [are] reasonable.") (citing *Yesterday's Children, Inc. v. N.L.R.B.*, 115 F.3d 36, 45 (1st Cir. 1997)). The General Counsel's argument must therefore be rejected.

d. THE ALJ PROPERLY DISMISSED GROVES' 8(A)(4) CLAIM (EXCEPTION 9).[5]

The ALJ found that the Respondent's arbitration agreement "restrains employees' Section 7 rights to engage in protected concerted conduct in violation of Section 8(a)(1)." ALJD, at 10:35-36. However, the ALJ dismissed Groves' claim that the arbitration agreement violated Section 8(a)(4) of the Act on the grounds that there was no evidence that Respondent "actually took further steps to enforce the unlawful policy" in retaliation for filing a charge or giving testimony under the Act – i.e., the protected activity under Section 8(a)(4). ALJD, at 11:3-15. The General Counsel maintains that the "agreement violates Section 8(a)(4) because an employee's hire is explicitly conditioned on waiving the right to receive any remedy from filing a charge with the Board." GC's Brief, at 22. The General Counsel's argument is without merit.

Section 8(a)(4) of the Act states that it is an unfair labor practice for an employer to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter[.]" 29 U.S.C. § 158(a)(4). As the ALJ noted, the application of 8(a)(4) to an employer's efforts to enforce an agreement as opposed to the mere maintenance of an agreement is consistent with the purpose of Section 8(a)(4) to "ensure effective administration of the Act by providing protection to employees who initiate unfair labor practice charges or assist the Board in proceedings under the Act." ALJD, at 11:5-7 (citing *General Services, Inc.*, 229 NLRB 940, 941 (1997).

The ALJ recognized that the case relied upon by the General Counsel in support of its argument that the maintenance of the arbitration agreement violates Section 8(a)(4) - *Bills*

[5] On June 29, 2018, the Respondent filed Limited Exceptions to the ALJ's finding that the arbitration agreement violates Section 8(a)(1) of the Act. The General Counsel's Exception 10 is that the "ALJ mischaracterized the General Counsel's Argument about the applicability of the *Boeing* Balancing Test." GC's Brief, at 24. Since the ALJ addressed the lawfulness of the arbitration agreement assuming that *Boeing* applies and alternatively that it does not apply and reached the same conclusion either way. *See* ALJD, at 9-10. Thus, the Respondent contends that the General Counsel's Exception 10 is of no consequence.

Electric., Inc. & Int'l Bhd. of Elec. Workers Local Union No. 95, 350 NLRB 292, 296 (2007) - is distinguishable from the instant case because the Board in *Bills* simply found that the maintenance arbitration agreement in that case violated Section 8(a)(1) whereas the employer's "attempt to enforce it in letters to the alleged discriminatees violated Section 8(a)(4) of the Act." Here, the ALJ found no evidence of the Respondent's attempts to enforce the agreement upon Groves because he filed a charge or gave testimony in this case – i.e., further attempts to enforce the agreement beyond merely maintaining the agreement, which violated Section 8(a)(1) in *Bill's Electric*. *See* ALJD, at 11:13-15. Since, under *Bill's Electric*, the Section 8(a)(1) analysis applies to the maintenance of an agreement and the Section 8(a)(4) analysis applies to the enforcement of the agreement, the General Counsel's argument that "there is no meaningful distinction between the 'further step' taken in *Bill's Electric* and Respondent's conduct in this case" lacks merit.

e. A NOTICE MAILING REMEDY IS NOT NECESSARY.

The ALJ's proposed Order directs that the Respondent "[n]otify all current and former employees who were required to sign or otherwise become bound to the arbitration agreement [that it] has been rescinded or revised, and provide them with a copy of the revised policy, if any." ALJD, at 12:14-16. The General Counsel requests an even more onerous "notice mailing remedy" because of Respondent's high turnover rate. GC's Brief, at 27. The remedy imposed by the ALJ is consistent with Board precedent in this area and is appropriate to effectuate the policies of the Act. In *Samsung Electronics America, Inc.*, 363 NLRB No. 105 (2016), the Board sought to remedy an unlawful arbitration agreement by ordering as follows: "Notify all current and former employees who were required to sign or otherwise became bound to the Agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised Agreement." This is the *same* remedy imposed by the ALJ in the instant case, and the General Counsel has failed to demonstrate that any more onerous remedy is required to effectuate the purposes of the Act.

III. CONCLUSION

WHEREFORE, for all of these reasons, the Respondent respectfully requests that the Board adopt the ALJ's findings of fact and conclusions of law and thus dismiss the allegations that the Respondent discharged Groves in violation of Section 8(a)(1) of the Act and dismiss the allegation that the arbitration agreement violated Section 8(a)(4) of the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the Respondent's Opposition to the General Counsel's Exceptions to the Decision of the Administrative Law Judge was served this 13th day of July, 2018, to:

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